No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

Preliminary Statement.

This is an appeal by plaintiff-appellant from a final judgment of the District Court of the United States, Southern District of California, Central Division, Hon. Peirson M. Hall, Judge, in favor of defendant-appellee, entered March 17, 1945, after the granting of the motion of defendant-appellee for summary judgment, under Rule 56 (c), Federal Rules of Civil Procedure (28 U. S. C. A., following section 723c), in a suit at law for damages for breach of contract.

II.

Basis of Jurisdiction.

(a) In the District Court.

Jurisdiction in the District Court lies in the diversity of citizenship provisions of 28 U. S. C. A., section 41, subdivision 1.

The complaint alleges that appellant is a partnership, all of whose partners are citizens of the State of Ohio; that appellee is a corporation organized under the laws of the State of California; that the amount in controversy exceeds $3,000.00, exclusive of interest and costs [Transcript of Record, p. 2].

(b) In the Circuit Court.

Jurisdiction in the Circuit Court of Appeals exists by virtue of the provisions of 28 U. S. C. A., section 225, subdivision (a), first, granting to Circuit Courts of Appeal appellate jurisdiction to review by appeal final decisions in the District Court.

A Circuit Court of Appeals has jurisdiction on appeal from a judgment granting a defendant's motion for summary judgment:

> *Bee Machinery Co. v. Freeman,* 131 Fed. (2d) 190 (C. C. A., Mass., 1942), affirmed 319 U. S. 448, 63 S. Ct. 1146.

The judgment from which the appeal is taken is a final judgment [Tr. pp. 78, 79] of a District Court, review of which is sought in the particular Circuit Court of Appeals embracing the state in which is located the District Court which rendered the judgment.

The judgment was entered on March 17, 1945 [Tr. p. 79], and the appeal was filed on April 20, 1945 [Tr. p. 80], well within the time authorized by law. (28 U. S. C. A., Sec. 230.)

III.

Statement of the Case.

The complaint [Tr. pp. 2-5] alleges that appellee, on June 12, 1944, agreed in writing to purchase from appellant, and appellant by its acceptance of said order sold 1400 cases of Portuguese Suarez brandy, F. O. B. an Atlantic port, appellee to pay for said merchandise by draft attached to the bills of lading, the gross purchase price of $41.55 per case, less reserve for internal revenue tax and customs duty of $27.63 per case, or a net purchase price of $13.62 per case; that appellee made a part payment by check of $1400.00; that on June 14, 1944, appellant received a telegram from appellee whereby appellee sought to cancel said agreement; that appellee stopped payment upon said check.

The complaint further alleges that appellant made available and segregated for appellee said merchandise in a public warehouse and appellant is ready, able, and willing to ship the same, or deliver the warehouse receipt thereon, to appellee.

Recovery is sought of the purchase price of $19,488.00 plus expenses incurred in warehousing the merchandise, or in the alternative, if the Court should determine that appellant is not entitled to said relief, for the damages suffered for said breach of contract in the difference between the contract price of $13.92 net per case and the market value of $5.00 net per case, a total of $12,488.00 plus warehousing charges.

The answer [Tr. pp. 6, 7] generally denies the allegations of the complaint; denies the execution of any agreement and alleges affirmatively that appellee "did make an offer to purchase certain brandy from [appellant] and mailed a check in the sum of $1,400.00 to the [appellee]

together with said offer." Another defense alleges that the complaint fails to state a claim upon which relief can be granted.

Each of the parties thereupon moved for summary judgment; the motion of appellant was denied; that of appellee was granted. Appellee's motion was based upon affidavits and "upon the papers and documents on file."

The court rule (Rule 56, subdivisions a, b, c and e, Rules of Civil Procedure) provides that on a motion for summary judgment, consideration shall be given to "the pleadings, depositions, and admissions on file, together with the affidavits."

Appellee supported its motion by the affidavits of Aaron Lilien, Irven Rose and M. D. Weiner and the supplemental affidavit of Aaron Lilien.

Appellant resisted appellee's motion (and supported its own motion) by the deposition of Howard S. Bernon, one of the partners of appellant; the affidavit of Mr. Bernon; the affidavit of Joseph Sachs; interrogatories submitted to appellant under Rule 33, Rules of Civil Procedure, and its answers thereto.

(a) Appellee's Supporting Documents.

The affidavit of Irven Rose states that during the time involved he was a stockholder and secretary of appellee; that he signed the "order" referred to in the complaint on behalf of appellee; that he signed the deposit check of $1,400.00; that he handed the order to M. D. Weiner, an agent of appellant, for transmittal to appellant; that he was advised by Mr. Weiner that shipment could probably be expected on confirmation of the order; that no confirmation was received; that it has always been the custom and usage in the trade that all orders should be

in writing, subject to acceptance by the seller, either by the written confirmation or by actual shipment of the merchandise [Tr. pp. 15, 16].

The affidavit of Aaron Lilien, president of appellee, states that in the morning or at noon of June 14, 1944, he advised Mr. Weiner that he desired to cancel the order of June 12, 1944, because Mr. Rose was severing his connections with appellee and also because the affiant was worried about the brandy passing California authorities; that Mr. Weiner advised him to wire his cancellation to appellant before the order was confirmed; that the affiant immediately telegraphed such cancellation and stopped payment on the check; that appellee did not receive any notice of acceptance of said order; that it is the general custom and usage in the liquor trade that all orders should be in writing and subject to acceptance by the seller either by written confirmation or actual shipment; that Mr. Weiner was never employed by appellee and had no authority to make any commitments on its behalf [Tr. pp. 17, 18].

The affidavit of M. D. Weiner states that he has been a sales agent for various companies; that he was such sales agent for appellant in connection with the present transaction; that he took the purchase order involved herein; that he advised appellee that said purchase order was subject to acceptance by appellant upon receipt of a properly executed order in writing, accompanied by a deposit check; that it has always been the custom and usage in the liquor trade that all orders taken by salesmen are subject to acceptance by the principal by written confirmation or actual shipment of the merchandise and that his dealings with appellee were on that basis; that he was never employed by appellee nor did he ever have any authority to make any commitments on its behalf; that on

June 14, 1944, Mr. Lilien advised the affiant that he desired to cancel said order and the affiant advised Mr. Lilien to wire his cancellation to appellant before confirmation because the affiant had no authority to bind his principal, either in taking the order or in cancellation [Tr. pp. 19, 20].

The supplemental affidavit of Aaron Lilien states that either at the end of May or the beginning of June, 1944, he received a telephone call from a person representing himself as Howard S. Bernon of Imported Liquors Company of Cleveland, Ohio; that Mr. Bernon told the affiant that he had a shipment of brandy which had been approved by the federal government and asked affiant whether that would satisfy the requirements contained in affiant's letter of May 20, 1944; that affiant answered that that was not sufficient because the brandy had to be passed also by California authorities; that Mr. Bernon asked the affiant how much brandy appellee could use and affiant stated that he could not answer until he had discussed it with other members of his firm, but that no consideration would be given to any order until he was convinced that the brandy would pass California authorities; that when he received the letter on June 5, 1944, from appellant he handed it to Mr. Weiner for the sole purpose of checking with California authorities; that the price of the brandy in question has not declined since June, 1944 [Tr. pp. 73, 74].

(b) Appellant's Opposing Documents.

Howard S. Bernon, a partner of appellant, testified at the deposition, at which both sides were represented by counsel, that he received a letter from appellant dated May 20, 1944 [Plaintiff's Exhibit E, Tr. pp. 58, 59, 60], dictated by M. D. Weiner on appellee's stationery, signed

by Aaron Lilien, inquiring about imported Portuguese brandies, setting forth California requirements, and concluding that:

> "In view of the above, and if you still think that your Brandy will pass the necessary inspection, and upon receipt of advice from you, that you are willing to accept an order on this basis, we will be happy to hand one over to your Representative, Mr. Morris D. Weiner, who incidentally is familiar with our Portuguese Brandy problem and can further advise you, upon request."

Mr. Bernon on June 5, 1944, placed a long distance telephone call to Mr. Lilien and discussed the matter with him; he informed Mr. Lilien that appellant had a shipment of brandy, originally 1500 cases, of which 1400 were left available for sale; they had been passed by the Food and Drug Administration of the United States Government and therefore could meet all the requirements of his (Lilien's) letter of May 20th; that he could send Lilien a photostat of this approval and that it would not be necessary for the merchandise to be re-examined in California by any federal or state authorities; that Mr. Lilien asked him to please not sell the merchandise to anybody else and to put it aside for him; that he, Bernon, thereupon agreed to accept Lilien's order and to put aside the 1400 cases and not to sell them to anybody else; that he thereupon hung up the 'phone, gave instructions to his agents not to sell that merchandise but to hold it as it was being sold to the Los Angeles Liquor Company; that he had a photostatic copy made of the certificate of the Food and Drug Administration of the United States [Tr. pp. 27, 43, 46].

On the same day, June 5, 1944, following this telephone conversation, Mr. Bernon mailed to appellant a letter as follows [Plaintiff's Exhibit C, Tr. p. 57]:

> "Enclosed please find photostat of approval on a shipment of brandy which recently arrived in this country, by Federal Security Agency Food and Drug Inspection Station. Of these 1500 cases there are 1400 left and I will hold them for you for the next few days as per our telephone conversation of today. In view of the fact that this merchandise has been passed already it will not be necessary to submit it to the Federal Government for further inspection when it arrives in California. You certainly will not have any trouble on this lot if the State also makes an inspection.
>
> "Please wire me as soon as you know whether or not you desire these 1400 cases Suarez Brandy. Incidentally, the strip stamps are already affixed and shipment can be made immediately."

The approval of the Federal Security Agency Food and Drug Inspection Station is dated May 15, 1944, and was made a part of the deposition as Plaintiff's Exhibit I [Tr. p. 64].

Mr. Bernon testified that this approval covered the brandy which was the subject of the telephone conversation [Tr. p. 27].

Following the letter of June 5, 1944, Mr. Bernon received a letter from M. D. Weiner acknowldging the receipt of the letter of June 5th addressed to appellee, the pertinent part of which is as follows [Plaintiff's Exhibit G, Tr. p. 62]:

> "This will acknowledge receipt of your letter dated June 5, addressed to the Los Angeles Liquor Com-

pany and photostatic copy of the New York inspection No. 68041 pertaining to 1500 cases Suarez Portuguese Brandy which Mr. Aaron Lilien handed me to clear with the California Pure Food and Drug office. I will therefore wire you the following night letter 'Sold Los Angeles Liquor Company 1400 cases Suarez Brandy upon receipt of confirmation by wire or phone the Los Angeles Liquor Company will mail you 1400 dollars deposit as per your original instructions to me. advise.' M. D. Weiner"

Thereupon, on June 7, 1944, M. D. Weiner wired appellant as follows [Plaintiff's Exhibit H, Tr. p. 63]:

"IMPORTED LIQUORS CO— 1944 JUN 7 PM 9 13
RELET JUNE 5. SOLD LOS ANGELES LIQUOR COMPANY 1400 CASES SUAREZ PORTUGUESE BRANDY. UPON RECEIPT OF YOUR CONFIRMATION. BY WIRE OR PHONE THE LOS ANGELES LIQUOR COMPANY WILL MAIL YOU $1400.00 DEPOSIT AS PER YOUR ORIGINAL INSTRUCTIONS TO ME. ADVISE—

M. D. WEINER."

Mr. Bernon testified that after receipt of this wire he wired Mr. Weiner on June 9, 1944, asking for shipping instructions and confirming the sale [Tr. pp. 28, 29]. He testified that he was unable up to the time of the taking of the deposition to locate his copy of this wire but that Weiner acknowledged receipt of the wire by his telegram of June 9, 1944, addressed to appellant as follows, giving such shipping instructions [Plaintiff's Exhibit J, Tr. p. 65]:

"IMPORTED LIQUORS CO— 1944 JUN 9 AM 3 05
888 UNION COMMERCE BLDG CLEVE—

RECEIVED WIRE SHIP IN CARE OF FRANK P DOW CO 354 SOUTH SPRING ST LOS ANGELES CALIFORNIA PRO-

VIDING JUAREZ BRANDY LABEL AND PRICE HAS BEEN APPROVED BY WASHINGTON LOS ANGELES LIQUOR MAILING DEPOSIT AND PURCHASE ORDER FOR 1400 CASES JUAREZ BRANDY BASIS 41.55 PER CASE STOP I HAVE NOT YET RECEIVED AN ANSWER TO MY LETTER TO YOU DATED MAY 18TH WHEREIN I COMMENTED THAT 25 CENTS COMMISSION IS NOT SUFFICIENT AND REQUEST 50 CENTS PER CASE IN ORDER HAVE THE RECORD CLEAR SO THAT THERE CAN BE NO MISUNDERSTANDING BETWEEN US PLEASE CONFIRM BY WIRE OR LETTER AND OBLIGE—

M. D. WEINER."

On June 14, 1944 [Tr. p. 37], Mr. Bernon received by air mail, special delivery, Plaintiff's Exhibit A [Tr. p. 54], with check for $1,400.00 as follows:

"Los Angeles Liquor Co Inc.

Distributors of Wines and Liquors

3315 East Vernon Avenue
Los Angeles 11, California
Telephone KImball 7178

June 12, 1944

Imported Liquors Company,
888 Union Commerce Building
Cleveland, 14, Ohio, U. S. A.

Gentlemen, Purchase Order

"This will be your authority to ship 1400 cases Suarez brandy at $41.55 per case F.O.B. Atlantic Port, draft attached to bill of lading less $1.00 per case deposit which is herein enclosed ($1,400.00) less Internal Revenue Taxes, Duties and additional Federal Tax.

"Goods to be shipped in bond in care of the Frank P. Dow Co., 354 So. Spring St., Los Angeles, California.

"Please furnish the Frank P. Dow Co., your Federal Import licenses number in the event they may require it and also please mail them the bill of lading and oblige.

Yours very truly,

Los Angeles Liquor Co. Inc.,
Irven Rose
per Irven Rose

Air Mail—Special Delivery

Enclosure ($1,400.00 Check Deposit)

Our Bank is Bank of America, Vernon Branch, 3801 Santa Fe Ave.

Our California State Import license is L-136 G.

[Written]: O. K. M. D. Weiner [76]"

The check is Exhibit B and appears in the record at pages 55, 56.

On or about June 13, 1944, the trade was made aware by the War Production Board of the fact that there was to be a "liquor holiday" under the terms of which distillers in the United States would be allowed to produce gin and whiskey (the transaction at bar involved the purchase of brandy); the effect of this so-called liquor holiday was to reduce the marketability of the type of imported brandy appellant had sold to appellee; that brandies had been used for the past two years more or less as a substitute for domestic whiskies which were not available; that the market value of brandy decreased as a result of the liquor holiday [Tr. pp. 31, 32, 71].

Following the receipt of the "purchase order" dated June 12, 1944, and later in the same day Mr. Bernon received the wire of appellee dated June 14, 1944, pur-

porting to cancel the "purchase order," Plaintiff's Exhibit A, reading as follows [Plaintiff's Exhibit D, Tr. p. 58]:

"IMPORTED LIQUOR CO— 1944 JUN 14 PM 4 25
888 UNION COMMERCE BLDG CLEVE—

IRVEN ROSE WHO PLACED ORDER WITH YOU FOR 1400 CASES FUAREZ BRANDY SOLD HIS INTEREST IN LOS ANGELES LIQUOR COMPANY NO LONGER WITH US PLEASE CANCEL ORDER AND RETURN DEPOSIT CHECK AND OBLIGE CONFIRM—

1400. AARON LILIAN."

Mr. Bernon testified that he made some effort to get ahold of Weiner; that he was out of town for a while [Tr. pp. 38, 39]; the bank notified him on June 26th [Tr. p. 56] that the check was dishonored and that on June 29, 1944, he wrote to the appellee rejecting its purported cancellation and insisting on its completion of the contract [Plaintiff's Exhibit F, Tr. pp. 60, 61].

He testified that he caused said brandy purchased by appellant to be segregated in the Rockefeller Center Warehouses, Inc., in New York City and set aside for appellee; that appellant has at all times since June 5, 1944, been and still is ready to deliver the same to appellee [Tr. pp. 33, 34, 36, 39, 42]. The warehouse receipt was introduced in evidence as Defendant's Exhibit 1 [Tr. p. 66].

The witness testified that the custom of confirming the acceptance of an agent's order was not followed in the present case for the reason that he agreed with Lilien in the telephone conversation of June 5, 1944, to accept his order and put aside 1400 cases for appellee and not sell the same to anybody else; that the "deal" was made on June 5th and that the only thing holding up the delivery was whether or not he could produce a photostatic copy of approval from the Food and Drug Administration;

that he sent him a photostat and asked him to wire; that instead "he had his man Weiner wire me" [Tr. pp. 45, 46, 47].

With respect to Weiner's agency, Mr. Bernon testified that it has been the practice in the liquor industry for the last few years for agents to represent sellers and buyers at the same time due to the fact that buyers have been unable to obtain enough merchandise to satisfy their needs; in the present transaction Weiner was acting as the agent of the appellant as well as appellee [Tr. pp. 45, 40].

Pursuant to Rule 33, Rules of Civil Procedure, appellant submitted to appellee interrogatories [Tr. pp. 8, 9] which appellee answered as required [Tr. pp. 10, 11]. The substance of the interrogatories and answers is that Irven Rose, who sent the wire of cancellation [Tr. p. 58], was, at all of the times involved, a stockholder and secretary of appellee, in charge of sales, and authorized to make purchases of liquor on its behalf. Appellee was asked if there was any reason for endeavoring to cancel the purchase order dated June 12, 1944, by the telegram dated June 14, 1944, other than the reason stated in the telegram (that Irven Rose sold his interest in the firm). Appellee's answer was:

> "There was still some doubt in our minds whether there would not be some trouble about passing the Brandy with the California authorities, and I decided that it was too much Brandy to order, in view of the fact that Mr. Rose was leaving the Company. Aaron Lilien" [Tr. p. 11].

In passing we call the attention of the Court to the fact that neither in the answer, nor in any of appellee's affidavits, is the contention made that the brandy involved did not or would not pass California authorities.

Appellant filed an affidavit of Howard Bernon, which dealt with his telephone conversation with Mr. Lilien, the "liquor holiday," the depreciation in market value of the brandy after June 12, 1944, and the connection of Mr. Weiner to the parties [Tr. pp. 69-72].

The affidavit of Joseph Sachs, filed by appellant, dealt at length with market values of brandy [Tr. pp. 75-78], substantiating the allegations of the complaint and the testimony of Mr. Bernon.

Specification of Error.

The District Court erred in granting the motion of the appellee for summary judgment and in rendering and entering judgment thereon.

Argument.

The Court erred in granting appellee's motion and rendering judgment for appellee for the following reasons:

1. The record shows a binding agreement between the parties, which the appellee had no legal right to "cancel."

2. In any event, the showing made by appellee was not such that, within the purview of the summary judgment rule, the Court should have granted the motion, but on the contrary, should have denied it as a matter of law.

Rule 56, subdivision (b), Rules of Civil Procedure, provides that a party against whom a claim is asserted may at any time move, with or without supporting affidavits, for a summary judgment.

Rule 56, subdivision (c), provides that:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except

as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The summary judgment rule has been the subject of numerous decisions. Some pertinent rulings, particularly applicable to the case at bar, follow:

It was not the intention of Rule 56 that a case should be tried by affidavit as a substitute for trial in open court and that the parties be deprived of the opportunity for cross-examination:

Chemical Foundation, Inc., v. Universal Cyclops Steel Corp. (D. C., Pa.), 2 Fed. R. Dec. 283;

U. S. v. Newbury Mfg. Co. (D. C. Mass), 1 Fed R. Dec. 718.

The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact; it should be used with caution.

Gibson v. De LaSalle Institute, 66 Cal. App. (2d) 609 at 617, 152 Pac. (2d) 774;

Walsh v. Walsh, 18 Cal. (2d) 439 at 444, 116 Pac. (2d) 62.

A defendant is not entitled to a summary judgment unless the facts conceded show the right to a judgment with such clarity as to leave no room for controversy and that plaintiff would not be entitled to recover under any circumstances.

Clair v. Sears Roebuck & Co. (D. C., Mo.), 34 Fed. Supp. 559;

Dairy Engineering Corp. v. De-Raef Corp. (D. C., Mo.), 1 Fed. R. Dec. 679.

The burden of proof on a motion for summary judgment by a defendant requires the defendant to show by uncontradicted facts that as a matter of law there is no issue as to any material facts.

Ramsouer v. Midland Valley R. Co. (D. C., Ark.), 44 Fed. Supp. 523.

Summary judgment should be denied where general issues as to material facts are raised.

Hummel v. Wells Petroleum Co. (C. C. A. 7), 111 Fed. (2d) 883;

Vassardakis v. Parish (D. C., N. Y.), 36 Fed. Supp. 1002;

Boerner v. U. S. (D. C., N. Y.), 26 Fed. Supp. 769;

Ottinger v. General Motor Corp. (D. C., N. Y.), 27 Fed. Supp. 508.

On appeal from a judgment granting a defendant's motion for summary judgment, the Circuit Court of Appeals must give to plaintiff the benefit of every doubt:

Weisser v. Mursam Shoe Corp. (C. C. A., N. Y., 1942), 127 Fed. (2d) 344, 145 A. L. R. 467;

Walling v. Fairmont Creamery Co. (C. C. A., Neb., 1943), 139 Fed. (2d) 318.

In the light of the foregoing rules of construction and in view of the many material issues of fact on which there was a conflict, we submit that the motion of the appellee should have been denied.

The principal issues in the case were whether a binding agreement had been entered into, as contended by appellant, or whether the transaction constituted a mere un-

accepted offer, as urged by appellee, and whether appellee had the right to cancel. Included within these issues were the questions (1) whether there was a custom in the trade that orders should be confirmed or, assuming there was such custom, whether the parties acted without reference to or dispensed with such custom; (2) whether Weiner acted in the transaction on behalf of appellant only or was the agent of both parties; (3) the reasons for the attempted cancellation by appellee; and (4) market value of the brandy.

We submit that, aside from the conflicts of fact on these issues, the telephone conversation, letters and telegrams constitute a binding contract which appellant is entitled to enforce.

The negotiations were initiated by appellee's inquiry in his letter of May 20, 1944 [Tr. p. 58]. The long distance telephone call of June 5, 1944, which followed, concluded in a verbal agreement subject only to appellant's producing a photostatic copy of approval of the brandy by the Food and Drug Administration [Tr. pp. 47, 46, 27]. Appellant immediately instructed its agent to put aside and hold the brandy for appellee [Tr. pp. 42, 43, 37]. This was before the announcement of the liquor holiday by the War Production Board [Tr. p. 31], and at a time when appellant might have sold the brandy elsewhere, but refrained from doing so on appellee's request to hold it for appellee [Tr. p. 43].

Appellant confirmed the telephone conversation by its letter of the same day, June 5, 1944 [Tr. p. 57], enclosing the photostat, requesting appellee's wire of approval. Appellee then turned over this letter to Weiner who replied by letter on June 7, 1944 [Tr. p. 62], stating that Lilien handed him the Food and Drug Administration photostat

of approval to clear with the California authorities and that he would wire a night letter of approval to appellant. On the same day he did wire to appellant stating that he had sold 1400 cases of the brandy to the Los Angeles Liquor Company and that upon receipt of confirmation appellee would send the deposit of $1400.00 [Tr. p. 53]. Appellant on receipt of this night letter did immediately, on June 9, 1944 [Tr. p. 40], wire, acknowledging the order and asking for shipping instructions. On the same day, June 9, 1944, Weiner wired again acknowledging the receipt of appellant's wire and gave appellant shipping instructions [Tr. p. 65].

Then followed the "purchase order" by air mail letter, special delivery, dated June 12, 1944, from appellee to appellant, with enclosure of check for $1400.00 deposit [Tr. pp. 54, 55, 56]. This latter document is absolutely unconditional.

Lastly, we have, two days later, on June 14, 1944, appellee's wire to appellant purporting to cancel [Tr. p. 58], for a reason which was hardly consistent with the additional excuse given in the answer to the interrogatories [Tr. p. 11], or with the announcement of the liquor holiday by the War Production Board and consequent decline in the price of brandy.

These facts show that a meeting of the minds occurred in the telephone conversation of June 5, 1944, and that the agreement of the parties was completed and confirmed in writing by the letter and telegram of Weiner, whom appellee used, both dated June 7th. Weiner's wire of June 9, 1944, acknowledging appellant's wire of June 9, 1944, and giving shipping instructions, further confirmed the agreement. All of these communications by Weiner, who, as stated, was used by appellee, were still further confirmed by the appellee's air mail special delivery letter

denominated "purchase order" of June 12, 1944, accompanied by part payment of $1400.00. Nothing remained to be done by appellant and nothing more was asked of appellant, except to ship the brandy, preparation for which had already been attended to [Tr. p. 39]. This was intercepted by appellee's wire of June 14, 1944, purporting to cancel and the brandy continued to remain in the warehouse segregated for appellee [Tr. p. 36].

Appellee's theory that the document of June 12, 1944, was nothing more than a mere offer, after all of the preceding letters, telegrams and the telephone conversation, does not make sense.

We believe it clear that all of the essential elements of a binding contract were present. (*Civil Code of California,* Secs. 1549, 1550.) While all of the details of the contract are, in our opinion, present in the telegrams and letters, it should be remembered that the note or memorandum required under the statute of frauds to render a contract enforceable need not contain all of the details of an agreement between the parties, but is sufficient if it contains the essential elements.

> *Gibson v. De LaSalle Institute*, 66 Cal. App. (2d) 609 at 627, 152 Pac. (2d) 774 (and numerous cases from other states there cited).

It is a court's duty to so interpret a contract "as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

> *Civil Code of California*, Sec. 1636.

> "The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> *Civil Code of California,* Sec. 1641.

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."
>
> *Civil Code of California*, Sec. 1643.

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. For this purpose it is proper to consider the relations between the parties, the work to be done and the correspondence relating up to the execution of the agreement.

Civil Code of California, Sec. 1647;

Code of Civil Procedure of California, Secs. 1856, 1860;

Williams v. Ashhurst Oil etc. Co., 144 Cal. 619, 78 Pac. 28;

Payne v. Neubal, 155 Cal. 46, 99 Pac. 476.

Appellee neither pleaded nor contended in any affidavit, or otherwise, that it had any of the statutory reasons for extinguishment of an enforceable contract.

Civil Code of California, Sec. 1682 *et seq.*

The recovery sought is in accordance with standard rules: The purchase price fixed by the agreement plus warehousing charges, or in the alternative, if the Court should determine that appellant is not entitled to the full contract price, damages equal to the difference between the contract price and the market value, plus warehousing charges.

Section 1783, Civil Code of California (which is section 63 of the Uniform Sales Act), provides for the recovery by a seller of the purchase price where the buyer wrongfully neglects or refuses to pay for the goods.

Section 1784, Civil Code of California, provides that if the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action for damage for non-acceptance, the measure of which is the estimated loss directly and naturally resulting, in the ordinary course of events; that where there is an available market, the measure, in the absence of special circumstances, showing greater damage, is the difference between the contract price and the market or current price when the goods ought to have been accepted.

In *Porter v. Gibson*, 25 Advance California Reports 499 at 507 (California Supreme Court, Dec., 1944), 154 Pac. (2d) 703, we find the following:

> "One of the rights of a vendee (vendor) of personal property under a contract for the sale of such property, upon the refusal of the vendee to take the property and pay the agreed price, is 'Standing on the sale the vendor may retain the property for the vendee and sue for the purchase price.' (Cuthill v. Peabody, 19 Cal. App. 304, 308 (125 P. 926).)"

To the same effect see also:

47 *Am. Jur.* 723;

22 *Cal. Jur.* 1067, 1083;

Union Liquors, Inc., v. Finkel, 44 Cal. App. (2d) 706.

Conclusion.

The clear preponderance of the facts and the law on all phases of this case are with the appellant. If the case was to have been finally decided on mutual summary judgment motions, the decision thereon should have been for appellant, not appellee. Certainly, all doubts in the matter should have been resolved in favor of a trial on the merits with opportunity to each party to present witnesses and to cross-examine in open court. The judgment should be reversed.

Respectfully submitted,

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